(3)

Supreme Court, U.S.
FILED
MAY 31 2000
CLERK

No. 99-1551

IN THE

Supreme Court of the United States

SEMTEK INTERNATIONAL INCORPORATED,

Petitioner,

v.

LOCKHEED MARTIN CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF SPECIAL APPEALS OF MARYLAND

REPLY TO BRIEF IN OPPOSITION

WALTER J. LACK
STEVEN C. SHUMAN
ENGSTROM, LIPSCOMB & LACK
10100 Santa Monica Blvd.
Los Angeles, CA 90067
(310) 552-3800

LAURENCE H. TRIBE*
KENNETH CHESEBRO
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

THOMAS V. GIRARDI
JAMES KROPFF
GIRARDI & KEESE
1126 Wilshire Blvd.
Los Angeles, CA 90017
(213) 977-0211

ANDREW W. ZEPEDA
STEVEN L. HOGAN
LURIE & ZEPEDA
9107 Wilshire Blvd.
Beverly Hills, CA 90210
(310) 274-8700

Counsel for Petitioner

*Counsel of Record

May 31, 2000

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

36 pp

TABLE OF CONTENTS

1. Semtek's first question, on whether this Court's holding in *Dupasseur* is still good law, is framed at the proper level of generality and is squarely presented by this case 1

2. Lockheed's argument below, repeated in this Court, that *Dupasseur* is no longer good law because of the enactment of the Federal Rules of Civil Procedure is appropriate only for the merits stage 6

3. Lockheed's argument that Semtek is making a "collateral attack" on the California federal court judgment is without basis, as the California federal court itself held 9

CONCLUSION 11

TABLE OF AUTHORITIES

CASES: PAGE:

Andes v. Paden, Welch, Martin & Albano, P.C., 897 S.W.2d 19 (Mo. App. 1995) 4
Cemer v. Marathon Oil Co., 583 F.2d 830 (6th Cir. 1978) 4
Dupasseur v. Rochereau, 88 U.S. (21 Wall.) 130 (1874) ... *passim*
Embry v. Palmer, 107 U.S. 3 (1883) 7
Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 8, 9
Hancock National Bank v. Farnum, 176 U.S. 640 (1900) 7
Hanna v. Plumer, 380 U.S. 460 (1965) 7
Hart v. Yamaha-Parts Distributors, Inc., 787 F.2d 1468 (11th Cir. 1986) 4
Hillary v. Trans World Airlines, 123 F.3d 1041 (8th Cir. 1997) .. 5
Kent County Bd. of Educ. v. Bilbrough, 309 Md. 487 (1987) 3
Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962) 3
Knights of Pythias v. Meyer, 265 U.S. 30 (1924) 7
Metcalf v. City of Watertown, 153 U.S. 671 (1894) 7
Murphy v. Klein Tools, Inc., 935 F.2d 1127 (10th Cir. 4
NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) 4
Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329 (10th Cir. 1988) 4
PRC Harris, Inc. v. Boeing Co., 700 F.2d 894 (2d Cir.) 4
Shoup v. Bell & Howell Co., 872 F.2d 1178 (4th Cir. 1989) 4
Stoll v. Gottlieb, 305 U.S. 165 (1938) 7

STATUTES, RULES, AND SCHOLARLY MATERIALS:

Conformity Act of 1872, ch. 255, 17 Stat. 196 (repealed 1948) .. 7
Fed. R. Civ. P. 41(b) ..... *passim*
Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L. Rev. 733 (1986) 8
Graham C. Lilly, *The Symmetry of Preclusion*, 54 Ohio St. L. J. 289 (1993) 8
Stuart D. Smith, Note, Erie *and the Preclusive Effect of Federal Diversity Judgments*, 85 Colum. L. Rev. 1505 (1985) 8
Allan R. Stein, Erie *and Court Access*, 100 Yale L.J. 1935 (1991) 8
18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* (1981) 8

REPLY TO BRIEF IN OPPOSITION

Lockheed advances two principal reasons for denying the petition. First, Lockheed argues that the primary question presented by Semtek, regarding the status of this Court's holding in *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130, 135 (1874), is framed at too high a level of generality given the nature of this case. Opp. at 6-7, 11-15. But the threshhold issue of whether federal or state law defines the res judicata effect of the judgment of a federal court exercising diversity jurisdiction is posed here just as Lockheed posed it below, as the courts below posed it, and as the decisions of other courts cited by Lockheed have posed it. It is plainly an important question which should be definitively settled through a grant of certiorari in this case.

Second, Lockheed argues that, in any event, the first question is easily resolved on the merits against Semtek. Opp. at 8-11. In particular, here Lockheed repeats its argument made below that the *Dupasseur* holding was predicated on the Conformity Act of 1872, ch. 255, 17 Stat. 196 (repealed 1948), and thus was swept away by enactment of the Federal Rules of Civil Procedure in 1938. This merits argument is flawed but, more importantly, it is a *merits* argument, not a reason for denying certiorari. *Dupasseur* and is progeny are square holdings of this Court that are contrary to the judgment below. Even if this Court were inclined to endorse Lockheed's argument and the approach taken below, it should grant certiorari rather than stand by and permit the lower courts to simply ignore this Court's precedents.

1. Semtek's first question, on whether this Court's holding in *Dupasseur* is still good law, is framed at the proper level of generality and is squarely presented by this case

Lockheed argues that Semtek has not "properly identified" the issue in this case, which it asserts involves simply the proper "application of a Federal Rule of Civil Procedure — Rule 41(b), governing the effect of dismissals — to a federal diversity judgment." Opp. at 6. According to Lockheed, the first question presented, on whether this Court's holding in *Dupasseur* remains

good law, is defined at too high a level of generality. That question, Lockheed argues, is one concerning "general res judicata principles" that supposedly is pertinent only "in the absence of a relevant Federal Rule of Civil Procedure," and thus is "entirely different from the one presented here." Opp. at 7. By contrast, Lockheed argues, here one must skip over the general issue of federal or state law, and consider only Rule 41(b), which "speaks directly to the res judicata issue in dispute." *Id.*

It is Lockheed that is artificially recasting the core issue, not Semtek. The parties have been in agreement from the start of this case that the threshhold issue on Lockheed's motion to dismiss is whether the res judicata impact of the California federal court judgment is generally governed by federal law, or instead by state law. This is the very issue that appears as Semtek's first question presented. It was also the threshhold issue posed in Lockheed's oral argument to the trial court, which is reproduced in its entirety in the Supplemental Appendix ("SA") bound with this reply. At the outset of its oral argument, Lockheed framed the res judicata analysis as involving two "discrete questions," as follows (SA at 3a):

> The first question is to what law does this court look to determine what the effect of that prior judgment is? And the second question is what does that law tell this court is the effect of that prior judgment?

As to the relative importance of the two questions, Lockheed agreed with the trial court's assessment that the issue is "really determined — the issue is determined by the ruling on whether federal law applies, or does not apply." SA at 8a. In addressing this threshhold issue, Lockheed argued that general principles of federal law control with respect to res judicata, and made no suggestion that Fed. R. Civ. P. 41(b) somehow directly resolves the case on narrower grounds. For example, Lockheed relied on previous Maryland authority generally holding that "Federal law determines the effects under the rules of *res judicata* of the judgement of a federal court," and on a Fourth Circuit case holding "at the outset that federal, not state, law determines the preclusive effect of a prior federal judgment." SA at 4a. Only

after advancing a threshhold argument that federal law generally controls the res judicata effect of a diversity judgment did Lockheed move on to "the second issue, which is what does federal law tell you?" SA at 7a.[1]

The Maryland appellate court below decided the two issues exactly as Lockheed framed them from the start. It first decided the threshhold issue of federal or state law holding, based on such cases as *Kent County Bd. of Educ. v. Bilbrough*, 308 Md. 487, 494 (1987), that it "is well settled that it is federal law that determines the preclusive effect of a federal judgment." Pet. App. 7a. Only after resolving this issue did the appellate court review what the trial court identified as "[t]he applicable federal law" — namely, Rule 41(b). Pet. App. 8a.

The same is true of the res judicata cases cited by Lockheed in support of its assertion that, in every res judicata case cited by Semtek where "a controlling Federal Rule of Civil Procedure governs" the particular res judicata issue at hand (whatever that means), the courts have resolved the case based on that Rule alone, without consideration of the threshhold issue of federal or state law. Opp. at 11-12. Lockheed's reading of these decisions is wrong. Like the appellate decision below, these decisions (with just one exception) deal both with the threshhold issue of source of law and, separately, with the Federal Rule of Civil Procedure that had been identified as arguably applicable.[2] They

---

[1] At this juncture Lockheed introduced its argument that the federal law rule defining the res judicata effect of the California federal court judgment is Rule 41(b). SA at 7a-8a. It was explicit in its view that an analysis of Rule 41(b) comes into play only after an initial threshhold decision that federal law applies — the exact opposite of what it is presently arguing in this Court. *See* SA at 12a (indicating that Rule 41(b) becomes relevant "once you get to federal law, once you decide, if you do, that you should be guided by federal law in determining the res judicata effect of Judge Collins's judgement").

[2] *See, e.g. Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962) (explicitly deciding and rejecting, separate from Rule 41(b) analysis, plaintiff's contention "that California and not federal law controls" res judicata effect); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989) (noting "at the outset that federal, not state, law" governs res judicata

do not disprove the logic of the two-step analysis used by Lockheed below, and replicated by Semtek in the petition.

Further, on this point Lockheed essentially ignores the cases cited in the petition from the three federal circuits, and the numerous states, that still adhere to this Court's *Dupasseur* holding that the res judicata effect of a federal court diversity judgment is governed by state law. Lockheed pays attention only to those jurisdictions that have *already* given some indication that such res judicata issues are to be treated as matters of federal law — a stance that then logically leads such courts to treat an arguably applicable federal Rule as quite important.

Obviously, a test of Lockheed's theory that Rule 41(b), standing alone, renders *Dupasseur* irrelevant is only possible if this theory holds in courts that *adhere* to the *Dupasseur* holding and decline any general use of federal law in measuring the res judicata effect of a federal diversity judgment. But Lockheed's theory fails in such courts. For example, the Eighth Circuit adheres tightly to the *Dupasseur* approach and has repeatedly rejected any use of federal law to determine the res judicata effect of a federal court diversity judgment. See Pet. at 19 & note 14.

---

effect, before any consideration of Rule 41(b)); *Andes v. Paden, Welch, Martin & Albano P.C.*, 897 S.W.2d 19, 21 (Mo. App. 1995) (deciding that federal law of res judicata applies, before considering Rule 41(b)); *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896 n.1 (2d Cir. 1983) (deciding separately from Rule 41(b) analysis that federal law of res judicata applies); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 831 (6th Cir. 1978) (holding that federal law of res judicata applies, before considering Rule 41(b)); *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29 (10th Cir. 1991) (appearing to rely entirely on Rule 41(b) for result, without consideration of threshhold issue of federal or state law); *NAACP v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990) (discussing issue of federal or state law separately from analysis of Rule 41(b)); *Hart v. Yamaha-Parts Distribs., Inc.*, 787 F.2d 1468, 1470 (11th Cir. 1986) (same); *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1332-33 (10th Cir. 1988) (discussing issue of federal or state law separately from Rule 13(a)).

We note that in the first full paragraph of Opp. at 12, Lockheed purports to describe a pattern that "holds through all the cases cited by petitioner," but then discusses three cases never cited by Semtek.

Indeed, in *Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1043-44 (8th Cir. 1997) (cited in Pet. at 19 n.14), the Eighth Circuit refused to follow the lead of other circuits that had applied federal law to measure the res judicata effect of an earlier statute-of-limitations dismissal in a diversity case.

This is just what one would expect from the Eighth Circuit: a holding directly contrary to the holding of the Maryland courts below. Yet in its zeal to deny that any conflict exists, Lockheed belittles the Eighth Circuit's competence by asserting that the Eighth Circuit "did not . . . recognize that Federal Rule 41(b) addresses this issue, so it had no opportunity" to realize that Rule 41(b) dictates a uniform federal res judicata rule in this context. Opp. at 13 n.6. On examination, this theory falls apart: the Eighth Circuit had every opportunity to adopt Lockheed's Rule 41(b) approach, for it was specifically argued by the appellee (the pertinent excerpts of the brief are reproduced in SA at 16a-20a). Citing Rule 41(b) and several decisions from other circuits relying on Rule 41(b) for a federal res judicata rule governing statute-of-limitations dismissals, the appellee there argued that "the Federal Rules appear to dictate the preclusive scope of a federal judgment." SA at 18a-20a. The Eighth Circuit squarely rejected this argument, and instead measured the res judicata effect solely under state law, consistent with its adherence to this Court's *Dupasseur* line of authority.

In sum, not only is the first and main question presented framed at an *appropriate* level of generality with respect to the circumstances of this case, it is also phrased in *exactly the same way* that Lockheed framed it from the beginning of this case until its brief opposing certiorari. Lockheed makes no real effort to deny that this question, as framed, is an important one that has been the subject of much confusion in the lower courts for decades, and that the question is one that ought to be resolved at the earliest opportunity.[3] Nor does Lockheed deny that the first

---

[3] Lockheed's only effort at a denial lies in its observation that, among the federal circuits, "the clear majority rule is that federal law governs the effect of federal diversity judgments as a general matter, without regard to the

question is decisive of Lockheed's motion to dismiss: if this Court grants review of the first question and answers it yes, reaffirming in full *Dupasseur* and its progeny, then Lockheed's motion will be denied, as California law will then govern the preclusive effect of the earlier judgment, under which Semtek wins.[4] A grant of certiorari on the first question is thus warranted.

2. Lockheed's argument below, repeated in this Court, that *Dupasseur* is no longer good law because of the enactment of the Federal Rules of Civil Procedure is appropriate only for the merits stage

Lockheed also presents a merits argument with respect to the first question, centering on the enactment of the Federal Rules of Civil Procedure in 1938. It provides no reason to deny certiorari.

In its appellate brief below, Lockheed answered Semtek's *Dupasseur* argument by asserting that it is "no longer good law." SA at 13a-14a. Even though the *Dupasseur* line of cases has never been overruled or explicitly modified by this Court, Lockheed argued that it is "no longer valid today" because it was supposedly founded upon the Conformity Act of 1872, which was repealed in conjunction with the enactment of the Federal Rules of Civil Procedure. SA at 14a.

---

existence of a relevant Federal Rule." Opp. at 14 n.7. The petition showed as much, *see* Pet. at 14-23, but Lockheed ignores the salient point. That most federal circuits have on their own departed from the *Dupasseur* line of cases, even though *Dupasseur* has never been overruled or explicitly modified by this Court, cuts for, not against, granting review — to ensure that this Court's precedents are respected unless and until changed. *See* Pet. at 10-13. Further, Lockheed ignores the fact that the clear majority rule among the states is to adhere to *Dupasseur*, *see* Pet. at 23-24, so that, even if every federal circuit were to abandon *Dupasseur*, there would remain enormous conflict and confusion among the lower courts, and there would be even greater rewards for forum shopping between federal and state courts than already exist.

[4] As Lockheed has never disputed, and does not dispute here, if the res judicata effect of the California federal court statute-of-limitations dismissal is measured by California law, then that dismissal does not preclude suit in Maryland. *See* Pet. at 4-5. Nor has Lockheed moved to dismiss on the basis that the suit is time-barred under Maryland law. *See* Pet. at 4 n.3; Opp. at 4.

In opposing certiorari, Lockheed again focuses on the enactment of the Federal Rules of Civil Procedure as an event establishing that the *Dupasseur* liné of cases is no longer good law. It argues that, at least where a specific Rule pertains to the res judicata issue at hand, the analytic structure of *Hanna v. Plumer*, 380 U.S. 460 (1965), not the rule of *Dupasseur*, should control. Opp. at 8-11. This is an argument on the merits that should be reserved for the merits stage; it is not a reason to deny certiorari. If Lockheed were correct that the rationale for the *Dupasseur* line of cases died with the Conformity Act, and that the *Dupasseur* rule is incompatible with the Federal Rules of Civil Procedure, then this Court should grant certiorari and so hold. It would thus end the current situation in which some lower courts still adhere to *Dupasseur* while others deem *Dupasseur* to have been implicitly overruled by subsequent events, so that the meaning of any given federal court diversity judgment depends on the accident of the court in which it is later tested.

We hasten to add that persuasive answers certainly exist to meet Lockheed's merits argument centered on the enactment of the Federal Rules of Civil Procedure. First, not once in *Dupasseur* or in this Court's decisions elaborating and applying *Dupasseur* did this Court mention the Conformity Act of 1872. It is difficult to discern in these decisions any basis for concluding that the rule the Court was articulating — that diversity judgments have the same res judicata effect they would have if rendered by a state court in the forum state — derived from the fact that, under the Conformity Act, federal court and state court procedures happened to be substantially similar. The only authorities cited by this Court in these cases were the constitutional and statutory provisions on full faith and credit, and the general jurisdictional statutes. *See, e.g., Embry v. Palmer*, 107 U.S. 3, 9-10 (1883); *Metcalf v. Watertown*, 153 U.S. 671, 676 (1894); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 644-45 (1900); *Knights of Pythias v. Meyer*, 265 U.S. 30, 33 (1924); *Stoll v. Gottlieb*, 305 U.S. 165, 167, 170 (1938).

Second, and consistent with the authority relied on by this Court in its *Dupasseur* line of cases, there is ample scholarly

analysis supporting the view that the issue of what the res judicata effect of a federal court diversity judgment should be — both then and now — is not a question bound up in the particular procedures that a federal court uses in processing cases, but is instead an issue lying outside the bounds of procedure. *See* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L. Rev. 733, 741-55, 772-76, 781-83 (1986); Graham C. Lilly, *The Symmetry of Preclusion*, 54 Ohio St. L. J. 289, 320-21 (1993); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945, 985-89 (1998); Stuart D. Smith, Note, Erie *and the Preclusive Effect of Federal Diversity Judgments*, 85 Colum. L. Rev. 1505, 1513-18 (1985).

Third, Lockheed's theory that the enactment of the Rules produced a sea change that washed away the *Dupasseur* line of cases is inconsistent with the fact that, on at least three occasions since enactment of the Rules, this Court has taken care to articulate a rule for the res judicata effect of federal court judgments so as to avoid displacing *Dupasseur*. *See* Pet. at 12. If it were so obvious that enactment of the Rules itself displaced the previous framework for analyzing the res judicata effect of diversity judgments, presumably in these cases this Court would simply have announced a flat rule governing all judgments, rather than exhibiting such care to leave *Dupasseur* undisturbed.

Fourth and finally, with respect to Lockheed's construction of Fed. R. Civ. P. 41(b) in particular, the scope of the claim preclusive effect of a statute-of-limitations dismissal of an action in another jurisdiction is not determined by the words "on the merits" in Rule 41(b) but rather by considerations of federalism and full faith and credit. *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4441, at 372-73 (1981), and the authorities cited in Pet. at 28-29 n.22; *see also* Allan R. Stein, Erie *and Court Access*, 100 Yale L.J. 1935, 1937-39 (1991). The question, we suggest, is not one of issue versus claim preclusion, as Lockheed argues, Opp. at 17 n.8, but a matter of the proper *scope* of claim preclusion — in particular, its impact on a subsequent action in another forum. Thus the case is very much like a case raising a question of the

applicability of the mutuality rule when a dismissal has occurred "on the merits." (Lockheed concedes that in cases involving "issues such as mutuality," Opp. at 14, the question of mutuality vel non is not answered by Rule 41(b).)

In other words, a federal court statute-of-limitations dismissal in a diversity case made "on the merits," or "with prejudice," is entitled to *whatever* preclusive effect it has under the law governing that effect. *See* Pet. App. 64a-70a (analysis to that effect of the California federal district court that issued the judgment at issue in this case). If the relevant law (state law, under *Dupasseur*, or else federal law, if *Dupasseur* is overruled or modified) follows the majority approach, *see* Pet. at 29 & n.23, the dismissal merely precludes any further claim within the forum state. Under the minority approach, *see* Pet. at 29-30, such a dismissal will also bar a claim in any other jurisdiction. Regardless of which approach is taken, the scope of the preclusive effect of the dismissal is not dictated by Rule 41(b).[5]

3. Lockheed's argument that Semtek is making a "collateral attack" on the California federal court judgment is without basis, as the California federal court itself held

In an effort to suggest a final obstacle to review, Lockheed closes its opposition with a confusing assertion that the petition somehow advances a "collateral attack" on the California federal court judgment. Opp. at 18-21. In so doing, Lockheed ignores the narrow analysis of the Maryland appellate court below with

---

[5] In a point related to its Federal Rules of Civil Procedure theory, Lockheed erects and then attacks a straw man in claiming that Semtek's "argument for California law" rests on *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Opp. at 8-9. To the contrary, Semtek's argument for applying California law to determine the res judicata effect of the California federal court's statute-of-limitations dismissal rests squarely on the *Dupasseur* case, decided 64 years before *Erie*. *See* Pet. at 10-13. *Erie* is not even cited in the petition. Of course, *Erie* principles may well be relevant in fleshing out the appropriate content of a federal common law rule for the res judicata effect of a statute-of-limitations dismissal in a diversity case, if this Court were to overrule or modify *Dupasseur*. *See* Pet. at 26-28. But that is another matter altogether.

respect to the one argument previously made by Semtek (not advanced here) that may have involved a collateral attack. Lockheed also ignores its past briefing on this point.

First, Lockheed's entire argument hinges on its imprecise observation that "[t]he Maryland appeals court rejected Semtek's argument . . . because it amounts to an impermissible collateral attack on the judgment of the California federal court." Opp. at 18 (citing Pet. App. 31a-32a). Lockheed neglects to mention that the court rejected only one of Semtek's arguments on that basis — not Semtek's *Dupasseur* argument, the only one being pursued in this case, but Semtek's alternative *Erie* argument concerning the form of the judgment entered by the California federal court, an argument that Semtek is definitely not pursuing here.[6] Because Semtek is not pursuing this argument at all, it can hardly be accused of making a "collateral attack" on the California federal court judgment based on this argument.

Second, there is no basis for suggesting that Semtek's remaining argument based on *Dupasseur*, concerning which source of law is used to decide the meaning of the California federal court judgment, involves any sort of "collateral attack" on the judgment. Semtek does not seek any *change* in the judgment; it seeks only a determination of what the judgment *means*. The meaning of that judgment has not previously been determined.[7]

---

[6] See note 5, *supra*. As we have pointed out without contradiction, the form of the California federal court judgment, and Semtek's earlier attacks on the form of that judgment, have turned out to be irrelevant to the disposition of this case. *See* Pet. at 4 n.2.

[7] As Lockheed itself observed in its brief below, the very purpose "of this appeal [is] to determine the preclusive effects of a **prior** federal judgment." Brief of Appellee filed Jan. 6, 1999, at 19 n.13. *See also id.* at 29 (noting that the California federal court's "Order denying injunctive relief made it perfectly clear that it has never determined the *res judicata* effect of its prior judgment."); Pet. App. 9a (noting that the California federal court had not determined the preclusive effect of its judgment); Pet App. at 71a & n.17 (California federal court order declining Lockheed's request that it decide preclusive effect, and concluding that the "matter can properly be decided by the appropriate court in Maryland, not by this court").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER J. LACK
STEVEN C. SHUMAN
ENGSTROM, LIPSCOMB & LACK
10100 Santa Monica Blvd.
Los Angeles, CA 90067
(310) 552-3800

LAURENCE H. TRIBE*
KENNETH CHESEBRO
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

THOMAS V. GIRARDI
JAMES KROPFF
GIRARDI & KEESE
1126 Wilshire Blvd.
Los Angeles, CA 90017
(213) 977-0211

ANDREW W. ZEPEDA
STEVEN L. HOGAN
LURIE & ZEPEDA
9107 Wilshire Blvd.
Beverly Hills, CA 90210
(310) 274-8700

Counsel for Petitioner

* *Counsel of Record*

May 31, 2000

TABLE OF SUPPLEMENTAL APPENDICES

SUPPLEMENTAL APPENDIX A
Transcript of oral argument in the Circuit Court for Baltimore County, Maryland, in *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, No. 97183023, April 23, 1998 ..... SA 1a

SUPPLEMENTAL APPENDIX B
Excerpt from Brief of Appellee Lockheed Martin Corporation in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 736 A.2d 1104 (Md. App. 1999), filed January 6, 1999 ..... SA 13a

SUPPLEMENTAL APPENDIX C
Excerpt from Brief of Defendant/Appellee Trans World Airlines, Inc., in *Hillary v. Trans World Airlines*, 123 F.3d 1041 (8th Cir. 1997), filed November 27, 1996 ..... SA 16a

SUPPLEMENTAL APPENDIX A

IN THE CIRCUIT COURT
FOR BALTIMORE CITY

SEMTEK INTERNATIONAL, INC.,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	CASE NO.
	*	
LOCKHEED MARTIN CORP., et al.,	*	97183023
	*	
Defendants.	*	
	*	

BALTIMORE, MARYLAND

April 23, 1998

BEFORE:

THE HONORABLE JOSEPH H. H. KAPLAN
ADMINISTRATIVE JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

ANDREW ZEPEDA, ESQUIRE
WALTER LACK, ESQUIRE
THOMAS GERARDI, ESQUIRE

FOR THE DEFENDANT:

FRANCIS BURCH, ESQUIRE
JEFF FROST, ESQUIRE
TONY MEAGER, ESQUIRE

RECORDED BY: VIDEO

TRANSCRIBED BY: DELORES HAY
OFFICIAL COURT REPORTER
517 COURTHOUSE EAST
111 NORTH CALVERT STREET
BALTIMORE, MD 21202

[2]

PROCEEDINGS

(9:35)

THE COURT: Good morning.

COUNSEL: Good morning, Your Honor.

THE COURT: It's a little bit warm in here. Have a seat. I didn't turn the heat on so that you move quickly. But the City has a system whereby they — on a certain date, the air conditioning goes on, and you can overheat prior to that date. And if on that date it's freezing, you doubly freeze, because they turn the air conditioning on. But anyway, this is Semtek International, Inc. versus Lockheed Martin Corp., case number 97183023 and it's Lockheed Martin's motion. Mr. Burch?

MR. BURCH: Thank you, Judge Kaplan. First of all, I'd like to introduce Jeff Frost who's from Omelbany and Meyers, Los Angeles, who's here at the counsel table with me, as well as my partner, Tony Meager.

THE COURT: Do you absolutely need the podium?

MR. BURCH: Would you prefer that I —

THE COURT: Yeah. Our concern it that the microphone —

MR. BURCH: The microphone won't pick up?

THE COURT: Won't pick up.

MR. BURCH: Rather than use that podium. [3]

MR. BURCH: Your Honor, what I'd like to do is start from the beginning here, and reduced to its simplest terms, what I do not believe is a terribly complicated issue.

What I'd like to do is I'd like to start with the order entered on May 8th, 1997 by Judge Collins in the first lawsuit filed against Lockheed in California by Semtek asserting the claims that have been asserted in this lawsuit pending in this court. Because the issue on this motion is what is the effect of that order? And I think it's important, before we get into complicated jurisprudence, to read the order.

It says it is ordered, adjudged and decreed that Plaintiff Semtek International, Incorporated, take nothing on its complaint in this action, that the action be dismissed in its entirety on the merits and with prejudice, and that this judgment be entered forthwith in favor of Defendants Lockheed Martin and Samuel Orcini.

Now after that order and judgement were entered in the federal courts in California, it's important to note what did happen and what did not happen.

What did happen was Semtek noted and appeal to the ninth circuit. What did not happen was a motion to reconsider or a motion to amend the order. So there is presently filed in the federal court in California that [4] judgement which I have just read the court which is presently on appeal in California. That brings us here. No one —

THE COURT: And the status of that is it's just still on appeal.

MR. BURCH: That's correct. It's —

THE COURT: Has it been argued —

MR. BURCH: I don't believe its been argued. I needn't state the obvious, but I can't resist. If Semtek prevails, the case will proceed in California. If it does not, it will certainly not proceed in California. And the issue is what is the effect of that judgment, final judgement, unamended, without any motion, without any motion to reconsider on this proceeding?

And I suggest to The Court that it raises two questions. They are discrete questions. The first question is to what law does this court look to determine what the effect of that prior judgment is? And the second question is what does that law tell this court is the effect of that prior judgement?

I'd like to take a minute, take each one of these questions. With respect to the question of what law does this court look, I

think the answer is found in the Kent case decided by the Court of Appeals, which says Federal law determines the effects under the rules of *res* [5] *judicata* of the judgement of a federal court. That was a holding in the case, and The Court cites to the restatement of judgements, Section 87.

And as this court knows well, the Maryland court tends to follow the positions of the restatements. It is the rare exception where the Maryland courts do not follow the restatement. But here we have an explicit holding by the highest court in this state that to determine the res judicata effect of a prior federal judgement, this court looks to federal law.

Now what else do we have? Well we happen to have an opinion by the Fourth Circuit Court of Appeals on the very same issue, the [Shoup] case which has been discussed in both briefs. And on page 1179 of the reported federal decision, The Court holds we note at the outset that federal, not state, law determines the preclusive effect of a prior federal judgment including the question of whether that judgement was on the merits.

And the fourth circuit goes on to say notwithstanding the fact that the Plaintiff filed her Maryland lawsuit, as did Semtek, allegedly, within Maryland's three year statute of limitations, that fact does not determine whether an earlier identical action between the parties found to be time barred because it was not filed within Pennsylvania's statute precluded the [6] Plaintiffs from bringing the lawsuit in Maryland.

So we have the Court of Appeals, we have Section 87 of the restatement of judgements, and we have a fourth circuit case, and they all tell this court exactly the same thing, and that is for the court, you look to federal law to answer that question.

Now why do these courts say that? Well I think the [Shoup] case makes it quite clear, it lays it out. This is not some arbitrary irrational rule that is designed to trip people up. It says we have this rule because we want a federal judgement to mean the same thing regardless of who's looking at it, just like the federal courts are required to give effect to a state law judgement, wherever that judgement might be argued.

THE COURT: Mr. Burch?

MR. BURCH: Yes, sir?

THE COURT: Semtek says, however, that it was Lockheed Martin that took the case to the federal court. And they filed in the state court in California. And, therefore — and the state court has never entered a judgement, though in all probability, their judgement would be very similar to the federal court because it was a limitations issue, and two year is two years is two years.

MR. BURCH: And presumably, the courts would reach the same conclusion. [7]

THE COURT: That's right. So they would've made the same ruling.

MR. BURCH: That's correct. Right.

THE COURT: But they didn't.

MR. BURCH: Right.

THE COURT: Clearly, if Semtek had been the one that filed in the California Federal Court, they would be stuck under 41-B, and they wouldn't have been able to proceed in Maryland in the Federal Court in Maryland. But do you think there's any difference because it is you all that took the case to the —

MR. BURCH: Not only do I not think there's any difference, but the fourth, fifth and a number of other circuits don't believe there's any difference. As a matter of fact, in [Shoup], that's exactly what happened. That's exactly what happened.

The first case was filed in Pennsylvania State Court. It was removed to Federal Court. It was the Federal Court that then entered a judgement on the statute of limitations grounds. And the later suit looked to the effect of the first judgement. And on those facts, the Fourth Circuit found federal law is the law that answers that question without regard to why or how the case got there. Because there was federal jurisdiction, the judgement was a valid judgement entered by a federal [8] tribunal, and the issue is what does that judgement mean?

Now [Shoup] and Thompson Trucking, the Fifth Circuit case, are directly on point in that respect, as are two other cases that I'll mention in a minute, two other circuit court cases, the Murphy case, and the — I had it here in my notes, the P.R.C. Harris case.

In every one of those cases, the first case was a diverse — was a case filed in State Court, diversity jurisdiction, removed to Federal Court, judgement based on the statute of limitations. And again, we're not talking about, we're not on to Rule 41 yet. We're just talking about what law do you look to answer the question.

And in all of those cases, they say you look to federal law. And the reason is we don't want to be dissecting federal judgements to say well this judgement's based on a federal statute, this judgement's based on a state claim, this case was originally filed in Federal Court, this case was not originally filed in Federal Court. What these courts say is this is a question of federal power, the integrity of a federal judgement, and they have made the determination that it doesn't matter whether it's a federal question case, a diversity case, and it doesn't matter how federal jurisdiction attached to the matter.

And I will jump ahead, Your Honor. I was going to address the Rule 41 point and then come back and deal **[9]** with Semtek's argument, but it doesn't matter. And the reason why it doesn't matter is because if you say, for whatever reason, and I don't think you do, we're going to give whatever preclusive effect to this judgement a California court would give it, whether you start by saying what would the Federal Court do or what would the State court do, you end up in the same place.

Because the Ninth Circuit in the Constantini case, right on this issue, said you look to California law which, in turn, like Maryland, says you look to federal law. And the Constantini case was followed twice by the Ninth Circuit, reaffirmed, in cases involving the same question in Washington and Oregon. So we've got three times now the Ninth Circuit has said if you look to state law, you look to the part of state law that says what law controls.

So if you were looking to Maryland law, for example, you'd look at the Court of Appeals decision in Kent, and that would say federal law controls. So you have the same result. You are directed to federal law if you look to the Court of Appeals, if you look to the restatement in Section 87, if you look to the [Shoup] case, if you look to Thompson Trucking, if you look to the Ninth Circuit cases, and if you look to the California Supreme Court

cases. **[10]**

Now let me move onto the second issue, which is what does federal law tell you? And again, the place to start is the rule that addresses this question explicitly. It's rule 41-B, and it says unless The Court, in its order for dismissal, otherwise specifies, it's important, in its order otherwise specifies, a dismissal under the subdivision, and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits.

Now I submit to The Court that we could decide this case without reference to anything else because the plain meaning of those words is this judgement that I've just read to The Court operates as an adjudication on the merits. But we don't have to stop there.

Because if we look at every reported federal decision that construes the meaning of those words in a holding including the [Shoup] case in the Fourth Circuit, they all reach the same conclusion. They all say it means exactly what it says. The plain meaning of those words is it is an adjudication on the merits. And they say that while explicitly recognizing that preclusion acts to bar the action even though the substantive issues have not been tried. And that's on page 1181 of the [Shoup] case.

So the Court of Appeals has its eye wide open. **[11]** They've heard the very same equity arguments that are made by Semtek here. And what they says is we understand that reading Rule 41, as it states, to bar this claim because the prior judgement was an adjudication on the merits, means that the underlying substantive issues were not tried.

Now why do they do that? Why do all of these cases do that? And they're cited all on page 14 of our reply brief. And they're all cited in the [Shoup] case. They do that for two reasons. Number one, The Court says that's what the language says. We don't have the power to start engrafting, essentially, equitable exceptions onto the rule. And that's exactly what the plaintiffs argued in [Shoup]. They said well, a limitations dismissal is sort of like some of these other things that are exempted from the operation of the rule, and

the Fourth Circuit says that's not what the rule says.

THE COURT: Well so they'd be right if — they'd be right if you're wrong on the application of federal law to this.

MR. BURCH: That's correct. If you — some states, although the trend is now moving toward the federal rule, Maryland —

THE COURT: Has not.

MR. BURCH: Has not, that's correct, and a number **[12]** of states have not. And that's where you see distinctions. But they are not dealing they are not construing a federal judgement. They are construing state judgments. And we don't make the rules, obviously. When I say we, this court, as a matter of fact, the fourth circuit really didn't make the rule. Congress and the Supreme Court made the rule, Rule 41. But they go on to talk about the Fourth Circuit.

THE COURT: So it's really determined — the issue is determined by the ruling on whether federal law applies, or does not apply.

MR. BURCH: I believe so, Your Honor. Because I really don't think there's any holding, there's any authority that does what the Plaintiffs would like this court to do.

Now I think it's important to look at the rationale in [Shoup]. [Shoup] said, number one, we have to do this because this is what the rule says. But it goes on to talk about why this makes sense, and why it makes sense even for a diversity judgement in the federal system to work this way. And they say, number one, the Plaintiff picks the forum.

And they are very clear that there are considerations that make selection of one forum riskier in some respects than selection of another forum. And they **[13]** say this is a reality, but the Plaintiffs pick the forum.

Now Lockheed is a Maryland company. It's not like this is a fact that should have been lost on them. We were here. The Maryland state of limitations is three years, and I'm not conceding this claim would be time barred under the Maryland statute. But there's nothing mysterious about this. They chose to file this lawsuit in California, there was federal jurisdiction. A federal court entered a final judgement. And under the [Shoup] case, that

judgement has res judicata effect.

The other things that the [Shoup] case says are this is important because it avoids inconsistent results, or the Defendant having to win twice.

Now this is not an abstract consideration, and it's not just Lockheed to which this rule applies because Defendants had to — we had to hire lawyers in California. There were extensive proceedings in California. We won that case. And under their scenario, we just start all over again in Maryland.

And I might say if they're correct, and this court — if this court were to determine that they were correct, and then decide against them on the statute of limitations, there would be absolutely nothing to prevent them from going to New York, which has a six year statute of limitations, where Lockheed can obviously be found in a **[14]** state court and naming a state defendant, and argue removal and arguing they can start all over again there.

So the Fourth Circuit says that interest is served here. And again, on page 1180 of the [Shoup] case, all of the authorities which hold the same thing are cited, and on page 13 of our reply brief these authorities are cited.

Now there's another very important authority in our brief. It's the Andes case. It's Andes vs. Paden, P-A-D-E-N. It's cited in our reply brief. Why is the Andes case important? It's important because the Andes case is a decision by the Missouri appellate court on exactly the same situation that happened here, case number one filed against the Defendant. This is a little unusual. It's a divorce case.

The husband tapes telephone conversations of the wife, or vice versa. A lawsuit's filed in the state court alleging violations of state law and state torts. After the state lawsuit is filed, a lawsuit is filed in federal court alleging violations of the federal antiwiretap law. That law has a two year statute of limitations. No state claim filed in the federal court action.

Defendant moves to dismiss the federal court action on the ground that the statute has run. Federal **[15]** court enters judgement in that case. Defendant then moves to dismiss the state case on res judicata grounds arguing that that final federal judgment precludes

the prosecution of the state case. And the parallel is striking because you're talking about a state court that's saying what effect do I give that federal judgement.

And what the Missouri appellate court said was you look to federal law, and you look at Rule 41-B, and you look at the cases which construe that rule, and they all say that there is res judicata effect, assuming that the claims asserted in state court could have been brought in the federal action.

So it's even more — it's even a more difficult result for a plaintiff because in that case they didn't file exactly the same lawsuits. They filed a federal claim in a federal court, and the Missouri court followed Rule 41, followed [Shoup], followed Thompson Trucking, followed all of these other circuit and district court cases and said the issue here is the efficacy of a federal judgment. And it is not for us to mess with that, just like we wouldn't want federal courts second guessing a state court on collateral estoppel, or the res judicata effect of a state judgement.

And that's consistent. If you're in federal court, and you are arguing that a prior state judgment **[16]** bars your claim, the federal courts say we don't look at rule 41. We look at the state law. And if the state law says it's okay, we respect that.

THE COURT: What if, after the federal judgement, the state court in California had done exactly the same thing? Would that make any difference?

MR. BURCH: I'm not sure what you mean.

THE COURT: Well forget the 41-B problem.

MR. BURCH: Right.

THE COURT: Let's assume we now had a judgment by the California State court obeying they're two year statute of limitation and dismissing the case, and now we have the Maryland case. What would be the situation with the Maryland case?

MR. BURCH: We would be arguing that The Court should give res judicata effect to that. But, under the current state of the law, I think that would have the better of the argument because both California and Maryland has, insofar as state judgements are concerned, make an analysis of whether the statute is a procedural matter or is part of the right. And in this case, I think there's — we

would be on the short end of that stick, to be perfectly candid with you.

But the federal rule, and the federal cases have explicitly declined to make this distinction between **[17]** whether the judgement, whether the statute of limitations is procedural, that is it affects only the remedy, or whether it is part of the right. The federal courts have confronted that head on.

And as I said before, these cases that I have cited were all cases that were filed in state court, and found their way into federal court by way of removal.

Now with respect to the judgement that was rendered by Judge Collins, if they'd filed this very lawsuit in California under the precedence of the Supreme Court of California, California state court would be required to give it preclusive effect.

So there's nothing untoward about this result, it just represents a difference that attains in some states between the effect that is given to a state judgement versus a federal judgement.

So I suggest to you that the California court, if they filed a second case in state court in California, California Supreme Court says you have to look to Federal law to determine the preclusive effect of that judgement, federal law takes you to Rule 41-B and the cases cited under Rule 41-B, and they lose. So if this court reaches a different result, they, in effect, get a better outcome than they would get if they filed in the same case in the state court in California. **[18]**

And I don't think anybody argues with that. I mean there are two Supreme Court — California Supreme Court cases that say if it's a federal judgement, you look to federal law.

Now what do — what does Semtek say about the Rule 41-B issue? And obviously, I'm sure they're going to have other things to say. But what I hear them saying is the policies that underlie the decision like [Shoup] don't apply here because those courts are basically trying to protect the federal court from vexatious litigation.

And I think there are two problems with that argument. Number one, if you read [Shoup] from front to back, it doesn't say that. The first sections of the [Shoup] holding deals entirely with

what does Rule 41-B say. The second section deals with policies that are served by the rule, and even there, it makes no reference to intra versus inter judicial system disputes.

The second problem with the argument is it amounts to a statement that the federal courts are available for one free advisory opinion. That is not consistent with a desire to promote finality, consistency and to spare defendants not just the expense and inconvenience of defending two lawsuits, but all of the collateral consequences that attach to being a defendant, particularly a lawsuit that alleges conduct which amounts **[19]** to or borders on fraud.

So I think if you get passed the — if you look at the opinions, they simply don't support this argument. And I would just conclude by saying that the only thing they can point to is some dictum in the Ranky case which really demonstrates why courts should follow holdings and not dictum. In Ranky, the issue was what is the preclusive effect of a state judgement, not a federal judgement. So it has absolutely nothing to do with the situation presented here.

And The Court's ruminations in a foot note about whether or not the rule in [Shoup], and Thompson Trucking, and Murphy, and PRC and the other cases say is or is not ill-advised. It is a classic case where a court that has no reason to address the issue does not speak with authority when it comments.

But again, I think the important point is once you get to Rule 41-B, once you get to federal law, once you decide, if you do, that you should be guided by federal law in determining the res judicata effect of Judge Collins's judgement, once you get there, I haven't seen a holding any court that says it doesn't have res judicata effect because it's a diversity opinion, based on diversity, or because the case was originally filed in state court, or because there is no interest of protecting the federal **[20]** court from vexatious litigation. So for those reasons, we would ask The Court to dismiss the case with prejudice. Thank you.

* * * *

SUPPLEMENTAL APPENDIX B

EXCERPT FROM BRIEF OF APPELLEE LOCKHEED MARTIN CORPORATION IN *SEMTEK INT'L INC. V. LOCKHEED MARTIN CORPORATION*, 736 A.2d 1104 (Md. App. 1999), filed January 6, 1999

[25]

Finally, Semtek argues that, in spite of all of the modern authority determining the full faith and credit or *res judicata* effect that must be granted to a prior federal judgment, *Shoup* and even *Constantini* are wrong because the Supreme Court held in 1900 that the full faith and credit doctrine dictates that a judgment of a District Court sitting in diversity must be given the exact same preclusive effect as a state court **[26]** decision from the state where that District Court sits. Thus, Semtek argues, federal preclusion law is inapplicable.

Semtek's argument is based on the following quote from *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640 (1990):

> The fact that this judgment was rendered in a court of the United States, sitting within the State of Kansas, instead of one of the states courts, is immaterial; for . . . it may be conceded, then that the judgments and decrees of the Circuit Court of the United States, sitting in a particular State, in the courts of that State, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority.

176 U.S. at 645. Semtek argues that this statement from *Hancock* is consistent with Rule 41(b), Restatement (Second) of Judgments § 87 and the Maryland Court of Appeals command in *Kent*, provided the Court reads these authorities to only require Maryland courts to look to federal law to determine the preclusive effect of "certain federal court judgments," namely judgments resolving federal questions.

There is no such limitation in Rule 41(b), *Kent* or the Restatement. More importantly, however, the proposition for which Semtek cites *Hancock* is no longer good law. When *Hancock* was decided, almost a hundred years ago, the Supreme Court's statement was correct on two levels: (1) State courts were required to give full faith and credit to federal, as well as state, court judgments; and the (2) the scope of a federal judgment was determined by the law of the state in which it was rendered because the Conformity Act of June 1, 1872, Ch. 255, 17 Stat. 196, required that the rules of practice and procedure of the federal courts be the same as those of the states in which the District Court sat.

Hancock's first point — that state courts must give full faith and credit to federal court judgments — supports Lockheed, not Semtek. As shown above, under federal law, Maryland law, California law and even "Ninth Circuit law," the Federal Court's judgment bars this action. To give that judgment full faith and credit, Judge Kaplan's judgment so holding must be affirmed. **[27]**

Hancock's second holding — that the scope of a federal judgment was to be determined by the law of the state in which it sat — might have supported Semtek's position if the Conformity Act were still in force. But it is not and has not been for over sixty years. The Conformity Act was repealed in 1934 by the Rules Enabling Act, Ch. 651, 48 Stat. 1064, which is now codified at 28 U.S.C. § 2072. *See generally* Degnan, 85 Yale L.J. at 755-59; Charles A. Wright, Law of Federal Courts at 737-38 (5th ed. 1994). Thereafter, the Federal Rules of Civil Procedure, including Rule 41(b) establishing the preclusive effect of federal judgments, were enacted in 1938.

In short, the second part of the Supreme Court's holding in *Hancock*, the part Semtek is attempting to rely on, is no longer valid today and has not been cited by the Supreme Court since the Federal Rules of Civil Procedure were adopted over sixty years ago. *Acme Granite & Tile Co. v. F.D. Rich Co.*, 441 F.2d 1143, 1143 (9th Cir. 1971); Degnan, 85 Yale L.J. at 755-59. After implementation of the Federal Rules, federal practice, in both federal question and diversity cases, came to differ from that of nearly all states. *See Byrd v. Blue Ridge Rural Electric*, 356 U.S.

525, 537 (1958) (explaining in a diversity case that the federal courts are an independent system for administering justice to litigants properly invoking its jurisdiction); Degnan, 85 Yale L.J. at 755-59. These Rules, including Rule 41(b), displace conflicting state rules of practice and procedure. Degnan, 85 Yale L.J. at 755-59; *see also Moore's Federal Practice* § 41.02 (3d ed. 1998). Rule 41(b) — not state law, not the repealed Conformity Act, and not the Supreme Court's superseded nearly 100 year old *Hancock* decision — establishes the *res judicata* effect of federal judgments.[19]

* * * *

---

[19] Semtek admits in footnote 10 of its brief that the Conformity Act rule stated in *Hancock* no longer applies in federal question cases following adoption of the Federal Rules of Civil Procedure, but contends that it still somehow applies in diversity cases. There is no support for finding that the statute was repealed for some purposes and not for others. To the extent state courts continue to cite *Hancock*, it is for its first uncontroversial proposition; that the full faith and credit doctrine not only requires state courts to respect the judgments of other states, but also the judgments of the federal courts. *See Osteoimplant Tech., Inc. v. Rathe Prod., Inc.* 107 Md. App. 114, 666 A.2d **[28]** 1310 (1995), *cert. denied*, 340 Md. 648 (1996) (citing *Hancock*). In *Osteoimplant*, the plaintiff, a judgment debtor, was asking the Circuit Court for Baltimore City to reopen a default judgment rendered by the Unites States District Court for the Southern District of New York and recorded in Maryland. 666 A.2d at 1311. When the judgment creditor attempted to enforce the judgment in Maryland, the debtor attempted to contest the amount of the debt by raising argument that were not presented in the federal court case. *Id.* The *Osteoimplant* court, citing *Hancock* for the proposition that a state court just give *res judicata* effect or full faith and credit to a federal judgment, refused to reopen the Southern District's judgment. *Id.* Nothing in *Osteoimplant* supports Semtek here.

SUPPLEMENTAL APPENDIX C

EXCERPT FROM BRIEF OF DEFENDANT/APPELLEE TRANS WORLD AIRLINES, INC., IN

Hillary v. Trans World Airlines, 123 F.3d 1041 (8th Cir. 1997), filed November 27, 1996

[5]

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF TRANS WORLD ON THE GROUNDS THAT HILLARY'S CLAIM WAS BARRED BY RES JUDICATA.

The District Court granted Trans World's Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56(c), holding that the judgment and dismissal with prejudice previously entered by the federal court in Louisiana, (Apdx. 10 and 11), operates as res judicata to her claim in Missouri, (Addendum). This Court reviews the District Court's grant of summary judgment *de novo*, applying the same standards as the District Court. *Reliance Ins. Co. v. Shenandoah South, Inc.*, 81 F.3d 789, 791 (8th Cir. 1996). The Court of Appeals must affirm the summary judgment if the record viewed in the light most favorable to the non-moving party show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Marren v. Mutual Life Ins. Co. Of New York*, 84 F.3d 1068, 1070 (8th Cir. 1996); *Anderson v. F.J. Little Machine Co.*, 68 F.3d 1113, 1114 (8th Cir. 1995) (citing F.R.C.P. 56 (c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). As set forth herein, summary judgment should be affirmed.

A. Under Federal Law, the Summary Judgment and Dismissal with Prejudice on Statute of Limitations Grounds Entered by the Louisiana District Court Sitting in Diversity Must Be Given Res Judicata Effect in This Successive Action in Federal Court

The threshold issue before this Court is whether federal or state law should govern the preclusive effect of a federal judgment when the prior court's jurisdiction was based on [6] diversity of citizenship. Trans World urges the Court to follow federal res judicata law to bar Hillary's claim here.

1. Federal, rather than state law, should determine the preclusive effect of the Federal Judgment dismissing Hillary's Louisiana case with prejudice.

Trans World acknowledges that this Court has recently held that state, rather than federal law, governs the preclusive effect of a judgment entered by a federal court sitting in diversity. *Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 617 (8th Cir. 1994).[1] However, the majority of circuits which have addressed the issue have held that the res judicata effect which will be given the judgment of a federal court is distinctly a matter of federal law. *J.Z.G. Resources, Inc. v. Shelby Ins. Co.*, 84 F.3d 211, 213 (6th Cir. 1996); *Havoco of America, Ltd. v. Freeman, Atkins & Coleman*, Ltd., 58 F.3d 303, 307 (7th Cir. 1995); *Johnson v. SCA Disposal Services of New England, Inc.*, 931 F.2d 970, 974 (1st Cir. 1991); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989); *Steve D. Thompson Trucking v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1045 (5th Cir. 1989); *Gibbs v. Air Canada*, 810 F.2d 1529; 1535 (11th Cir. 1987); *Hunt v. Liberty Lobby Inc.*, 707 F.2d 1493, 1497 (D.C. Cir. 1962). See also, Restatement (Second) Judgments §387 (1982). Because of the unique federal interests involved, Trans World respectfully and in good faith urges this Court to

---

[1] While the Court in *Austin* held state law applied, it acknowledged that the result under state law was essentially the same as federal law. 31 F.3d at 618, n.5.

reconsider the method in [7] which it determines the *res judicata* effect of a federal judgment.

Unlike state court judgments, a federal judgment can be, as in this instance, uniquely intertwined with the Federal Rules of Civil Procedure. Utilizing state res judicata law to determine the effect of a federal court judgment could put at risk firmly rooted federal rules. This was recognized by the Court of Appeals for the Second Circuit in *Kern v. Hettinger*:

> One of the strongest policies a court can have is that of determining the scope of its own judgments. (citation omitted) * * * It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of the federal jurisdiction is diversity. The rights and obligations of the parties are fixed by the state through its own judicial establishment. But we think it would be strange to allow a state to nullify the judgments of federal courts constitutionally established and given the power also to enforce state created rights. The Erie doctrine [*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)] is not applicable here . . . .

303 F.2d 333, 340 (2d Cir. 1982).

In a very similar factual scenario as presented here, the Fourth Circuit noted that although state law governs the rights and duties of the parties in a federal action founded upon diversity of citizenship under *Erie*, "questions of the effect and scope of the [federal court's] judgment involve the power of federal tribunal itself, and are not varied merely because the state rules of decision underlie the judgment." *Shoup v. Bell & Howell Co.*, 572 F.2d at 1179 (citing *Harnett v. Billman*, 800 F.2d 1308, 1312 (4th Cir. 1986)). These courts were concerned that [8] applying state law could abrogate the power and effect of a federal judgment.

This is especially true when the federal judgment rests in large measure on the application of the federal courts' powers under the Federal Rules of Civil Procedure and the federal interpretation and construction given those rules. While a prior federal court may utilize state law to determine whether judgment should be entered it in fact applies state law by way of and through the Federal Rules. Certainly in the case of voluntary and involuntary dismissals, the Federal Rules appear to dictate the preclusive scope of a federal judgment. *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128 (10th Cir.), *cert. denied*, 502 U.S. 942 (1991); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978).

As in *Steve D. Thomson, Shoup, Murphy, and PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983), this case involves the federal court in Louisiana dismissing a claim with prejudice pursuant to the Fed. R. Civ. P. 56, 41(a), and by implication Rule 41 (b). The Louisiana District Court, as well as the Fifth Circuit, utilized the power and import of federal common law to interpret Rule 41(a) to hold that Hillary's motion for voluntary dismissal without prejudice was properly denied and that the judgment and dismissal was to be entered with prejudice.[2]

---

[2] While affirming the summary judgment based on the statute of limitations defense, the Fifth Circuit's opinion primarily focused on its interpretation of Rule 41(a) and whether the denial of [9] Hillary's voluntary dismissal motion without prejudice was proper. Citing the *Phillips v. Illinois Cent. Gulf R.R.*, 874 (5th Cir. 1989), it held that such denial was appropriate because Trans World would otherwise have been stripped of its "absolute defense" of statute of limitations. (Apdx. 22 at 25-26). With an obvious eye to the federal litigation in Missouri given its opinion in *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044 (5th Cir. 1989), the Fifth Circuit took great pains to interpret the Federal Rule and federal common law in determining whether the dismissal should have been with or without prejudice.

As will be addressed *infra* at I(A)(2)., under federal common law, if a dismissal is "involuntary" or "with prejudice" it is "an adjudication on the merits" precluding duplicative litigation in the future on the same claim. In fact, it could easily be argued that the "with" or "without prejudice" provisions of Rules 41(a) and (b) were formed distinctly for the purpose of pre-determining the preclusive effect of a federal court judgment. It is then

(Apdx. 11 and 22). The Federal Rules of [9] Civil Procedure and the federal common law in interpreting and construing the federal rules were pivotal to the Louisiana District Court's judgment that the applicable state law barred Hillary's claim. Therefore, the preclusive effect of that federal judgment should be determined solely by force and magnitude of the Court's application of the Federal Rules of Civil Procedure and federal common law, not state law.[3]

* * * *

---

important to note that neither Rule 41(a) and (b) were formed distinctly for the purpose of pre-determining the preclusive effect of a federal court judgment. It is then important to note that neither Rule 41(a) or (b) distinguishes judgments rendered in courts whose jurisdiction is based on diversity or ones based on federal question. To allow state *res judicata* law determine the effect of the judgment that rests largely on interpretation of the federal rules leaves open the possibility that a federal judgment and dismissal with prejudice will not have the preclusive effect obviously intended by the federal rules.

[3] As discussed by Judge Gunn here, the Court in *Reinke v. Boden*, 45 F.3d 166, 170-171 (7th Cir.), *cert. denied*, -- U.S.--, 116 S. Ct.74 (1995), recognized that there is a difference between an intersystem dismissal (a judgment rendered by a state court and a subsequent action in federal court) and an intrasystem dismissal (a judgment entered by a federal court and a subsequent judgment entered by a federal court). (Addendum at 7). Although the *Reinke* court did somewhat explore the difference, [illegible] promotion of judicial economy in the system, it implicitly recognized that the result of such distinction was that the first system's forum (federal or state) law should govern the res judicata effect of its [10] judgments. *Reinke* thoroughly discussed Minnesota's intentions and right to determine the res judicata scope of its state court judgment. *Id.* at 170-172. Therefore, it stands to reason that the federal courts similarly have the right to determine the scope of their judgments and the subsequent effect in their judicial system. If for no other reason, federal res judicata law ought to apply since it is the federal judicial system which is being overburdened with multiple duplicative lawsuits.